RECORD AND BRIEFS

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In the Supreme Court of the United States

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF BSA | THE SOFTWARE ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF BSA | THE SOFTWARE ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

BSA | The Software Alliance is an association of the world's leading software and hardware technology companies. On behalf of its members, BSA promotes policies that foster innovation, growth, and a competitive marketplace for commercial software and related technologies. Because patent policy is vitally important to promoting the innovation that has kept the United States at the forefront of software and hardware development, BSA members have a strong stake in the proper functioning of the U.S. patent system.[1]

BSA's members advocate a balanced approach to patent enforcement litigation. BSA members are among the Nation's leading technology companies, producing much of the hardware and software that power computer and telecommunication networks. They thus pursue patent protection for their intellectual property and, as a group, hold a large number of patents. But, because of the complexity and commercial success of their products, they are also frequently subjected to patent infringement claims by others. BSA members oppose overly expansive approaches to

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Petitioner's blanket consent to the filing of *amicus* briefs is on file with the Clerk. Respondent's letter consenting to the filing of this brief has been filed concurrently with the brief.

venue that permit opportunistic forum-shopping by patent plaintiffs.

The members of BSA include Adobe, ANSYS, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, DataStax, IBM, Microsoft, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, Trimble Solutions Corporation, The MathWorks, Trend Micro and Workday.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should reaffirm that the patent venue statute, 28 U.S.C. § 1400(b), exclusively governs venue in patent cases. The Federal Circuit's contrary view—that the general venue statute, Section 1391, supplements Section 1400(b)—is untenable as a matter of law and has given rise to an epidemic of forum-shopping by patent plaintiffs.

I. The Federal Circuit's expansive approach to patent venue enables opportunistic forum-shopping by patent litigants, which erodes public confidence in the judiciary and imposes undue financial costs and burdens on patent litigants forced to defend suits in inconvenient venues.

The Patent Act carefully calibrates the rights of patentees and those of the public. To strike that balance, Congress precluded litigants from choosing venue strategically—enacting a specific patent-venue statute, and establishing the Federal Circuit to avoid forum-shopping for regional circuit law.

Notwithstanding this plain intent, the Federal Circuit has expansively interpreted the patent venue statute. That has produced an epidemic of forum-shopping. In 2015, 44.2% of *all* patent cases were

filed in just *one* of the Nation's ninety-four judicial districts.

Patent plaintiffs flock to magnet jurisdictions because they perceive a strategic advantage. Regardless of whether such an advantage in fact exists, there is a public *perception* that the choice of forum matters. Limiting undue forum shopping is necessary to eliminate the perception that patent litigants can alter the result of litigation through choice of venue.

Beyond these perceptions, improper venue for patent cases imposes undue burdens on litigants, witnesses, and the courts alike. Restricting patent venue to those jurisdictions identified in Section 1400(b), the result Congress intended, stops these unjustified costs.

II. The Federal Circuit's interpretation of patent venue is indefensible as a legal matter. This Court has *twice* held that the patent-specific venue statute (now codified as 28 U.S.C. § 1400(b)) is the only venue statute that applies in patent cases.

The Federal Circuit held that those precedents were superseded by a 1988 amendment to the general venue statute. That is wrong: the 1988 amendment—which was purely a ministerial amendment aimed at clarifying the law—did not override this Court's prior decisions on patent venue.

And, in any event, a more recent amendment to venue law makes clear that Section 1400(b) provides the exclusive venues for patent cases. The Court accordingly should hold that Section 1400(b)—which limits venue to jurisdictions where the defendant is incorporated or has a regular and established place of business—governs venue in patent cases.

ARGUMENT

A. Venue Shopping Imposes Unjustified Costs On The Patent System And Undermines Public Confidence.

1. The Patent Act embodies Congress's determination of the proper balance between the rights of patentees and the public.

The Patent Act reflects a policy judgment by Congress about how best to balance two goals: promoting innovation through incentives to inventors, and the market competition that leads to lower prices and product improvements. That is, "[i]n crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2406-2407 (2015); see also, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) ("From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.").

For that reason, the Patent Act should be interpreted to effectuate Congress's calibration of the rights of patentees with other market participants. Unduly favoring either plaintiffs or defendants causes "patent law's substantive policies [to] suffer." Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1464-1465 (2010).

To preserve the proper balance between patentees and the public at large, there must be confidence that patent litigants cannot manipulate the legal system to gain improper advantage. "The notion that

the law ought not be manipulable and that its application ought to be uniform is a fundamental tenet of our legal system." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 924 (2001).

Indeed, uniformity is precisely why Congress enacted a patent-specific venue statute in the first place. Congress adopted the first patent venue statute "to define the exact jurisdiction of the federal courts in actions to enforce patent rights and thus eliminate the uncertainty produced by the conflicting decisions on" patent venue. *Stonite Prods. Co.* v. *Melvin Lloyd Co.*, 315 U.S. 561, 565 (1942). Foreclosing forum-shopping was also the motivating force behind Congress's decision to create the Federal Circuit as the sole forum for appellate review of patent decisions. See S. Rep. No. 97–275, at 6 (1981) (explaining that centralized review of patent cases would promote "stability in the patent law" and thereby facilitate "technological innovation").

2. Forum-shopping by patent plaintiffs is widespread.

The Federal Circuit's expansive approach to venue in patent cases—exemplified by the decision below—has enabled pervasive forum-shopping by patent plaintiffs. And the existence of such forum-shopping demonstrates that patent litigants perceive a strategic benefit from filing suit in particular venues.

The data is dispositive. In 2013, 69.3% of all patent cases were filed in just nine of the country's 94 judicial districts, with 24.7% filed in a single district—the Eastern District of Texas. See Docket Navigator, *Year in Review 2014*, at 19 (2015),

goo.gl/mqxPyg. In 2014, 73.8% of patent cases were brought in the top nine districts, and 28.6% in the Eastern District of Texas. *Ibid.* And in 2015, 74.6% of cases were brought in the top *eight* districts—with 44.2% brought in the Eastern District of Texas alone. See Docket Navigator, *Year in Review 2015*, at 19 (2016). goo.gl/rncrlF.[2] Thus, in 2015, patent plaintiffs brought 44.2% of all patent cases in *one* district court.

Commentators have recognized, and criticized, this phenomenon. Forty-five law and economics professors wrote to the chairmen and ranking members of the House and Senate Judiciary Committees last year, urging them to address this systemic forum-shopping; they noted that, in 2015, *a single district judge* received nearly one third of all patent cases filed nationwide. See Letter from 45 Profs. to Reps. Bob Goodlatte & John Conyers & Sens. Charles Grassley & Patrick Leahy ("Professors' Letter") (July 12, 2016), goo.gl/HhnxyS. To clear that docket, they noted, the judge would have to complete "4 to 5 trials every day of the year." *Ibid.*

Other studies have confirmed the scope of forum-shopping in this context. See, *e.g.*, Colleen V. Chien & Michael Risch, Opinion, *A Patent Reform We Can All Agree On*, Wash. Post (Nov. 20, 2015), goo.gl/iKt46q (citing the "staggering concentration of patent cases in just a few federal district courts"); J.

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[2] See also, *e.g.*, Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 6 (2017) (finding that between January 2014 and June 2016, nearly 75% of patent cases were filed in just nine judicial districts—and 36% of all cases were filed in the Eastern District of Texas).

Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631, 633 (2015) (observing that in the two busiest districts for patent litigation—home to nearly half of all patent cases filed in 2013—"patent litigation comprises an astounding proportion of each court's docket" and that the two busiest judges "have larger patent dockets than does the entire Central District of California").

Litigants have few tools to check forum-shopping. Defendants sued in magnet jurisdictions are rarely able to move to dismiss for lack of personal jurisdiction, even if they have few contacts with a forum. That is because the Federal Circuit has taken an exceedingly broad approach to personal jurisdiction, holding that corporations can be sued for nationwide infringement in any district in which their allegedly infringing products are sold. See *Beverly Hills Fan Co.* v. *Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994); see also Pet. App. 10a.

Similarly, defendants cannot rely on *forum non conveniens* to avoid litigating in inconvenient magnet jurisdictions; as now-Judge Moore observed, *forum non conveniens* cannot "curb forum shopping among federal forums because it was superseded by the transfer statute." Moore, *supra*, at 925-926 (citing 28 U.S.C. § 1404(a)). Likewise, requests to transfer venue are often ineffective. Studies indicate that patent magnet jurisdictions rarely grant transfers—and, indeed, they often do so at rates lower than other courts. See Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 260-263 (2016); Anderson, *supra*, at 676.

3. The risks posed by forum-shopping justify careful adherence to the patent venue statute.

Patent plaintiffs file an overwhelming share of new lawsuits in a small handful of district courts because they *perceive* that their venue selections provide some form of strategic advantage.

To begin with, some courts have adopted special procedural rules for patent cases. Anderson, *supra*, at 634. Patent plaintiffs will predictably seek to file in courts whose local rules further their litigation strategy—and they will avoid venues with rules they perceive as unfavorable. For example, some procedures speed resolution of patent cases—which often benefits plaintiffs. Klerman & Reilly, *supra*, at 265. Additionally, some courts employ case assignment procedures that allow plaintiffs to reliably predict which judge will hear their case. *Id.* at 254–57. Litigants may therefore perceive value in seeking—or avoiding—specific judges based on past rulings in analogous cases.

Some studies suggest that there are disparities among district courts as to the frequency with which summary judgment is granted. *Id.* at 251–54. In light of these perceptions, litigants believe that their choice of venue will further specific litigation strategy.

Academic and industry literature undoubtedly fuels these perceptions. One study suggested that, while the national success rate for patent plaintiffs between 1995 and 2012 was roughly 32%, this figure was as high as 57.5% in magnet jurisdictions. PricewaterhouseCoopers, *2013 Patent Litigation Study: Big Cases Make Headlines, While Patent Cases Pro-*

liferate 23 (2013), tinyurl.com/lsnjawf. Another found that alleged infringers were far less likely to win a summary judgment motion in a magnet jurisdiction for patent litigation than elsewhere—which is critical, because among cases that go to trial, "[p]atentees win over 60% of the time." Klerman & Reilly, *supra*, at 251 (citing John R. Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1790 (2014)).

To be sure, the academic literature on this point is mixed, with other studies urging "caution in concluding that one district is necessarily more patent friendly than another." See Mark A. Lemley et al., *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 Stan. L. Rev. 1121, 1140 (2014).

In these circumstances, whether choice of venue makes a material difference in outcome is largely beside the point. What matters is that patent plaintiffs—and the public at large—have demonstrated a clear *perception* that these distinctions have real-world consequences.

There can be little dispute that "public perception of judicial integrity is 'a state interest of the highest order.'" *Williams-Yulee* v. *Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (quoting *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)); see also *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). If the public believes that the law is not being applied in the same way in every case and to every party, "the normative force of all of patent law suffers significantly." Fromer, *supra*, at 1465.

The indisputable forum shopping in patent cases is eroding public confidence in administration of the Patent Act. As the forty-five professors explained to Congress, there has been a "loss of trust in the uniformity and justness of the U.S. patent law system" due to forum shopping. Professors' Letter, *supra*, at 2. Other commentators note the "waste and damage done to the reputation of the U.S. patent system" from excessive venue shopping. Chien & Risch, *supra*.

Beyond these injuries to public confidence, opportunistic venue shopping imposes real-world harms on businesses because the jurisdictions in which forum-shopping plaintiffs tend to litigate are "often * * * not the closest or most convenient." Moore, *supra*, at 925. The districts chosen often "lack[] major population, corporate, or technology centers." Klerman & Reilly, *supra*, at 248.

And they may be far from the defendants' principal places of business, which drives their costs yet higher. See Professors' Letter, *supra*, at 2 ("For accused infringers, the costs of innovation are increased when they have little or no connection to the venue and are forced to litigate from a distance."); Chien & Risch, *supra* ("[B]eing sued in an otherwise distant location can dramatically increase the costs for defendants."); Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 Santa Clara High Tech L.J. 159, 165 (2008) (explaining that forum shopping allows patent plaintiffs to "subject[] defendants to the cost and inconvenience of having to litigate in a distant location").

As this Court has explained, by channeling cases to the proper forums, the venue rules "prevent the waste of time, energy and money" and "protect liti-

gants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen* v. *Barrack*, 376 U.S. 612, 616 (1964) (quoting *Cont'l Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 26, 27 (1960)) (internal quotation marks omitted).

Those considerations apply with special force in the context of patent law, for several reasons. For one, "[p]atent litigation is particularly complex, and particularly costly" (*FTC* v. *Actavis, Inc.*, 133 S. Ct. 2223, 2243 (2013) (Roberts, C.J., dissenting)), which means that the problems that always arise from litigating a case in an improper venue are magnified in patent cases. For another, as we explain *supra* (at p. 7), the Federal Circuit has held that a patent plaintiff can bring suit wherever the alleged product is sold, even if the sales are through a third-party retailer. It is thus far easier to forum-shop in patent cases than in other types of cases where personal jurisdiction rules are more strict.

Moreover, excessive litigation regarding venue wastes public and private resources alike. Given that the choice of forum is widely perceived to have an impact on the results of patent cases, an alleged infringer will often seek a transfer of venue when the plaintiff files in a magnet jurisdiction. "[R]esources are wasted in th[is] fight over the proper venue regardless of who ultimately wins." Moore, *supra*, at 926; see also Fromer, *supra*, at 1465 (noting the "waste [of] resources when litigants fight over the appropriate forum"). Not only do the private litigants bear these litigation costs, but the courts are forced to expend considerable time on preliminary venue determinations. Adherence to Section 1400(b)'s selection of venue for patent cases obviates the need for this burdensome motions practice.

B. Section 1400(b) Restricts Patent Venue To Jurisdictions Where The Defendant Is Incorporated Or Has A Regular And Established Place Of Business.

Although the Federal Circuit acknowledges that 28 U.S.C. § 1400(b), the patent venue statute, is the "specific venue provision pertaining to patent infringement suits" (Pet. App. 7a), it holds that Section 1400(b) is supplemented by 28 U.S.C. § 1391(c), which authorizes venue wherever a defendant corporation does business.

That reading of Section 1400(b) is wrong: as this Court has held several times, Section 1400(b) is the *exclusive* source of venue law in patent cases, and it authorizes venue in only the defendant's State of incorporation or in a jurisdiction where the defendant has committed acts of alleged infringement and has a regular and established place of business.

1. This Court has repeatedly held that Section 1400(b) limits patent venue.

For more than a century, Congress has employed a targeted, patent-specific statute to regulate venue in patent cases. And throughout that time, this Court has held that this patent-specific statute governs venue in patent cases, to the exclusion of the general venue statute.

Congress adopted the first patent-specific venue statute in 1897, in response to decisions of this Court and lower courts holding that patent suits were not subject to the general venue laws and that, accordingly, "infringers could be sued wherever they could be found." *Stonite Prods.*, 315 U.S. at 565. The patent venue provision of the Act of 1897, which became Section 48 of the Judicial Code, permitted suit only

in the "district of which the defendant is an inhabitant or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business." *Id.* at 563.

For a time, it was unclear whether Section 48 alone governed venue in patent cases or whether it was supplemented by general venue statutes elsewhere in the Judicial Code. But in *Stonite Products*, this Court held that Section 48 restricted venue in patent cases.

There, the respondent contended that Section 52 of the Judicial Code, a general venue statute applying in multi-defendant cases, "applies to patent infringement suits because it antedates Section 48 * * * and is consistent with and complementary to Section 48." 315 U.S. at 566. But the Court disagreed, observing that Section 48 was a "a restrictive measure, limiting a prior, broader venue." *Id.* at 566. It therefore concluded that Section 48 was meant to be the "exclusive provision controlling venue in patent infringement proceedings." *Id.* at 563.

In 1948, Congress recodified federal statutory law in the U.S. Code. Because the recodification made certain linguistic changes to the general and patent venue statutes, some patent litigants asserted that *Stonite Products* was no longer good law. But in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228 (1957), this Court rejected that argument, holding that the recodification had "made no substantive change" in the patent venue statute, now codified as 28 U.S.C. § 1400(b).

The respondent in *Fourco* argued that the new 28 U.S.C. § 1391(c), which generally defined corporate residence "for venue purposes," was "clear and

unambiguous and that its terms include all actions—including patent infringement actions—against corporations, and, therefore, that the statute should be read with, and as supplementing, [Section] 1400(b) in patent infringement actions." 353 U.S. at 223, 228.

But the *Fourco* Court refused to find the patent venue statute supplemented by the general provisions of Section 1391(c). The Court held that "[Section] 1391(c) is a general corporation venue statute, whereas [Section] 1400(b) is a special venue statute applicable, specifically, to all defendants in a particular type of actions, i.e., patent infringement actions." 353 U.S. at 228. The Court considered it "settled" that in such a circumstance, "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling." *Id.* at 228–29 (quoting *Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944)). Thus, it concluded, Section 1400(b) "is the sole and exclusive provision controlling venue in patent infringement actions, and * * * is not to be supplemented by the provisions of" Section 1391(c). *Id.* at 229.

2. Congress's 1988 amendment to Section 1391 did not abrogate Fourco.

In *VE Holding Corp.* v. *Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990), the Federal Circuit held that a 1988 amendment to Section 1391(c) undermined *Fourco*. That conclusion is wrong. The 1988 amendment was a housekeeping measure designed to clarify the law—not to overturn decades of settled precedent excluding patent cases from the ambit of Section 1391.

The 1988 amendment modified Section 1391(c) to read, in pertinent part: "*For purposes of venue under*

this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c) (1988) (emphasis added); see also Pet. 3 (comparing pre-1988 and 1988 versions of Section 1391(c)). Based on this change in wording, the Federal Circuit concluded that *Fourco* was no longer good law and the question whether the "new" Section 1391(c) governed venue in patent cases was a "matter of first impression." 917 F.2d at 1579.

The Federal Circuit then held that the new Section 1391(c) applied to patent cases. It reasoned that "[t]he phrase 'this chapter' [in Section 1391(c)] refers to chapter 87 of title 28, which encompasses §§ 1391-1412, and thus includes § 1400(b)." *VE Holding*, 917 F.2d at 1578. The court concluded that in using the phrase "this chapter," Section 1391(c) "expressly reads itself into the specific statute," Section 1400(b). *Id.* at 1580.

But that reading of the statute does not withstand scrutiny. As this Court has held time and again, "[u]nder established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley* v. *United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson* v. *Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912)). And there is no clear expression of intent in the 1988 amendment to change the law of patent venue. The Federal Circuit conceded as much, observing that there was "no specific legislative history regarding the amendment's effect on § 1400(b)." *VE Holding*, 917 F.2d at 1581.

Indeed, what legislative history there is suggests that the amendment did *not* mean to make any change to the law of patent venue. Congress described the amendment to Section 1391(c) as one of a number of "miscellaneous provisions dealing with relatively minor discrete proposals." H.R. Rep. No. 100–889, at 66 (1988). The reason for the amendment was to alleviate confusion about how to apply the statute in certain contexts, such as when determining "venue in multidistrict states" (*VE Holding*, 917 F.2d at 1578)—not to address any perceived problem with venue in patent litigation. The 1988 amendment to Section 1391(c) accordingly cannot be read to disturb *Fourco*'s holding that Section 1400(b) alone governs venue in patent cases.

3. The 2011 amendment to Section 1391 confirms that Section 1391(c) does not apply in patent cases.

VE Holding was wrong when it was decided. But even if *VE Holding*'s reading of the 1988 amendment to Section 1391(c) had been defensible at the time, it would have been overridden by Congress's subsequent amendment to Section 1391 in 2011—which makes clear that Section 1391 does not apply in patent cases.

In 2011, the Federal Courts Jurisdiction and Clarification Act amended Section 1391(a) to read, "*Except as otherwise provided by law*[,] * * * (1) this section shall govern the venue of all civil actions brought in district courts of the United States." 28 U.S.C. § 1391(a) (emphasis added). The import of this added language is plain: it establishes that Section 1391 governs venue generally but does *not* apply in contexts (such as patent cases) where another, more specific provision of law supplies a venue rule.

This Court adopted that very reading of Section 1391 in *Atlantic Marine Construction Co.* v. *U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013). There, the Court explained that "Section 1391 governs 'venue generally,' that is, in cases where a more specific venue provision does not apply." *Id.* at 577 n.2. And the Court cited Section 1400 as an example of one such "specific venue provision," noting that Section 1400 "identif[ies] proper venue for * * * patent suits." *Ibid.*

Atlantic Marine thus confirms that the relationship between Section 1391 and Section 1400(b) is the one recognized in *Fourco*: Section 1400(b), the more specific statute, displaces Section 1391 in the patent context.

In the decision below, the Federal Circuit dismissed both the 2011 amendment to Section 1391 and this Court's explanation of the amendment in *Atlantic Marine*. It argued that while Section 1400(b) governs venue in patent cases, Section 1400(b) does not define what "resides" means "when the defendant is a corporation." Pet. App. 7a. The definition of corporate residence in patent cases, the court held, is supplied by Section 1391(c), which it argued supplanted *Fourco*'s "common law definition of corporate residence for patent cases" in 1988. *Id.* at 6a.

But that reasoning is erroneous for two reasons. *First*, *Fourco* did not announce a "common law" rule of patent venue. The decision interpreted the language of Section 1400(b) and held that under that language, a corporation's residence for purposes of patent venue was limited to its State of incorporation. *Fourco*, 353 U.S. at 226. Later decisions of the Court likewise interpreted the statutory language—they did not purport to rely on "common law." See,

e.g., *Brunette Mach. Works, Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972) ("[T]he residence of a corporation for purposes of [Section] 1400(b) is its place of incorporation.").

Under *Fourco*, therefore, Section 1400(b) supplies its own definition of corporate residence. That reading of Section 1400(b) was not, and could not have been, undermined by the 1988 amendment to Section 1391.

Second, even leaving aside this Court's holdings in *Fourco* and *Brunette* that Section 1400(b) supplies its own definition of corporate residence, the broad definition of corporate residence in Section 1391(c) is incompatible with the plain text of Section 1400(b). Section 1400(b) provides for venue in "the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). By using the definite article "the" to refer to the defendant's district of residence, Section 1400(b) makes clear that there is only *one* such district. See, *e.g.*, *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004) ("The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."). That rules out the possibility that a patent defendant can be deemed to "reside[]" wherever it does business.

Moreover, if a defendant "resided," for purposes of Section 1400(b), wherever it did business, the second clause of Section 1400(b) (referring to a district in which the defendant has a "regular and established place of business") would be superfluous because any district in which the defendant did *any* business would be considered its residence. This

Court is "'reluctant to treat statutory terms as surplusage' in any setting"—"especially * * * when the term occupies so pivotal a place in the statutory scheme." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (alteration omitted) (quoting *Babbitt* v. *Sweet Home Chapter Communities for a Great Or.*, 515 U.S. 687, 698 (1995)). The only logical reading of Section 1400(b), therefore, is that a corporation's "residence" for purposes of a patent case is limited to its State of incorporation.

* * *

The Federal Circuit's construction of Section 1400(b) is untenable as a matter of statutory interpretation, and it has led to intolerable consequences—opportunistic forum shopping by patent plaintiffs, resulting in a loss of public confidence in the basic fairness of the patent system and potential disruption of Congress's substantive patent policies. It should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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